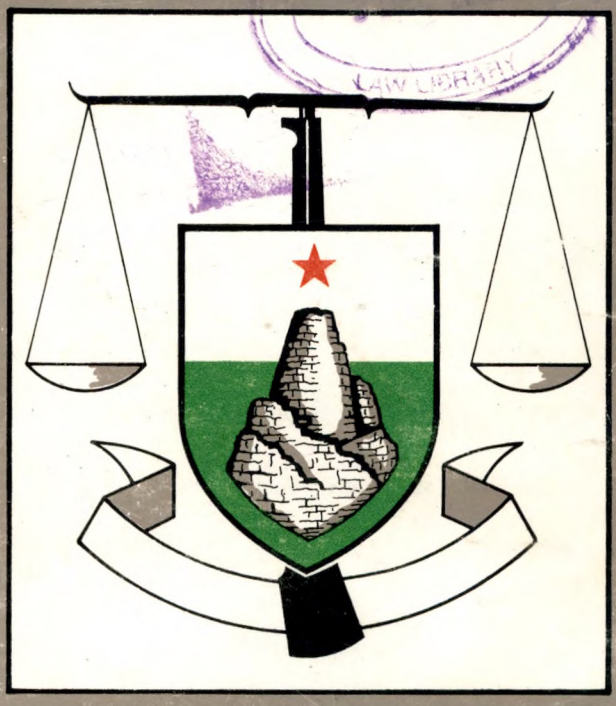

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CONSENT IN RAPE CASES IN SWAZILAND: A WOMAN'S RIGHT TO DECIDE

*ALICE ARMSTRONG**

Lack of consent is the essence of the crime of rape. Not only must it be shown that the complainant did not consent to the crime, but also that the accused was aware that she was not consenting. This article will discuss the element of consent for rape and other sexual offences in the law of Swaziland,[1] with reference to recent judgements.

1. THE CONSENT OF THE VICTIM

When a woman is battered, bruised, found naked and half dead by he side of the road, and then claims she has been raped, the public and the criminal justice system are quick to rise up in anger and indignation and to take her allegations seriously. There is no doubt that such a brutal crime is abhorred by all right-thinking persons. However, most rapes which occur, and even most rapes which reach the courts [2], do not have such a violent character.[3] In most rape trials, the central issue involves determining whether the female complainant has consented to the intercourse.

2. VIOLENCE, THREATS OF VIOLENCE, AND SUBMISSION

Roman-Dutch common law defines rape as unlawful and intentional sexual intercourse with a woman without her consent. Physical violence or force is not a necessary element of the crime. Lack of consent is sufficient. [4] The law therefore makes a distinction between

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* Lecturer, Faculty of Law, University of Zimbabwe.

1. Swazi Customary law is applied in the customary (Swazi National) courts. General law, including Roman Dutch common law and statutes, is applied in the Magistrate's Courts and High Court. Both court systems have jurisdiction over criminal cases, although the Swazi National Courts are not empowered to deal with cases in which death is an element. Therefore, theoretically, rape cases can be dealt with under the customary law. However, the policy of the Director of Public Prosecutions and the Police is to prosecute rape cases only in the High Court.

2. Probably only a small percentage of the rapes which are actually committed.

3. See, Armstrong, "Women as Victims: A Study of Rape in Swaziland", in Armstrong (ed.)(1987) Women and Law in Southern Africa Harare, Zimbabwe Publishing House.

4. Hunt, (1982) South African Criminal Law and Procedure Vol. II Cape Town, Juta, p. 442.

submission which is induced by fear and threat of violence, and consent which is freely given.

The clearest definition of the distinction between consent and submission for Roman Dutch law is found in R.v.Swiggelaar [5] :

> If a man so intimidates a woman as to induce her to abandon resistance and submit to intercourse to which she is unwilling, he commits the crime of rape. All the circumstances must be taken into account to determine whether it is merely the abandonment of outward resistance which the woman, while persisting in her objection to the intercourse, is afraid to display or realises is useless.

Because of stereotypes of how women behave sexually, and particularly when faced with sexual assault, the distinction between submission and consent is often blurred. Women are expected to be passive partners to be seduced rather than active partners in sexual encounters. Because a woman is expected to be passive, the court often infers from her passivity her consent to the intercourse. In the same way, women who are forced to have sexual intercourse are expected to fight back, "screaming, crying and fighting for their virtue." [6]

The notion that a woman who "really does not consent" will fight back has been clearly rejected by modern behavioral scientists studying rape. Understanding of "appropriate" behaviour for the rape victim has increased dramatically in recent years. Studies emphasize the life-threatening nature of the sexual assault, concluding that:

> "The typical rape victim's behaviour is terror-induced, pseudo-calm, and detached during the rape episode....Thus, the major coping task of the rape victim is not to avoid sexual contact, but to survive." [7]

In fact, a major study in the United States found that only about one fourth of rape victims physically struggle with their attacker. [8]

In Swaziland, fear of physically harm is likely to play an even larger part in the behaviour of most rape complainants since most rape cases which reach the courts involve young girls, below the age of 16[9] Although, as a general rule, most women are vulnerable to the greater physical strength of men, this vulnerability is even more pronounced in the case of young girls.

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4. Hunt, (1982) South African Criminal Law and Procedure Vol. II, Juta, Cape Town, p. 442

5. R v. Swiggelaar 1950 (1) PH H61 (AD)

6. Connors, "Violence against Women", a paper presented to the Meeting of Commonwealth Law Ministers, Zimbabwe, 26 July-1 August 1986.

7. Griffiths, "Understanding the Behavior of the Rape Victim: Fear is the Key", in The Detective, Vol. 12, No. 1, Spring 1985, p. 5, at p. 6.

8. Ibid.

9. Armstrong, op. cit., at p. 260.

It is clear that a woman's submission due to fear might be misinterpreted by judges unfamiliar with the psycho-dynamics of stress in violent situations. This is particularly true of male judges who might find it difficult to understand the extent to which females are affected by fear. As a result, judges have historically had a tendency to interpret a woman's failure to struggle and fight her sexual attacker as a sign of her consent to the act.

It is encouraging that this trend appears to be changing in Swaziland. Judicial attitudes have improved dramatically in recent years, exhibiting a sensitivity to the plight of the victim of sexual attack. This may be because of extensive publicity on the crime of rape, efforts on the part of women's groups to highlight the problem of rape in Swazi society, the Government's sympathy for this issue evidenced by some important legislative changes with regard to procedure in rape trials [10], or simply a change in the composition of the bench. Two cases will serve as examples.

The court in R. v Eteluino Albert Joaquin [11], decided in 1979, failed to appreciate the distinction between consent and submission. In that case the court declared:

> It seems to me that if the complainant was truly resisting the accused would not have been able to force sexual intercourse. His hand was engaged in throttling her and he would have found it well nigh impossible to force and keep her legs apart while taking off her pantie and penetrating her. He apparently had full intercourse with her while she was crying.

Such a statement exhibits a profound misunderstanding of and lack of empathy for the girl, who was faced with a life-threatening situation, frightened, and trying to preserve her life. On the other hand, by 1984, judicial attitudes seem to have changed and the court in Regina v Nhlanhla Coolbay Nhlabatsi [12] correctly recognized the distinction between consent and submission. In that case:

> Accused took the Complainant to a hut, kicked open the door, told the complainant to enter, lighted a lamp and bolted the door. He told her to lie on a bed and removed his trousers and had intercourse. She carried out these instructions as he had a knife and she was afraid he would carry out his threat to kill her... Counsel for the Defence pointed out that the Complainant walked with Accused to the hut where intercourse took place, she climbed on to the bed herself, did not resist when her panties were removed, and allowed her legs to be opened. She bore no bruises or other signs of injury.

These facts were held to amount to no more than submission, and not to constitute consent.

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10. Including the introduction of trials in camera in 1985.

11. R. v. Eteluino Albert Joaquin Criminal Case 33/1979 (unreported).

12. R. v. Nhlanhla Coolbay Nhlabatsi, Criminal Case S224/1984 (unreported).

3. SEXUAL BLACKMAIL AND UNDUE INFLUENCE

A woman may be pressured into having sexual intercourse with a man because of that man's position of power over her. This is particularly true in a society such as Swaziland, where all women are expected to submit to the constant supervision and obey the instructions of men. A Swazi woman, at least in times past and under customary law, is a perpetual minor[13], always under the guardianship of her husband or father. This obedience and submission on the part of women creates a situation where all men hold a position of power over all women. A woman, particularly a young woman, may therefore be pressured into having sex with a man simply because she has been taught to obey men.

In addition, in both the public and private sectors, men hold the vast majority of positions of authority. [14] Unscrupulous men may use their authority to induce women to submit to sexual intercourse. For instance, a woman's boss may threaten to sack her if she does not sleep with him, or an employer say that he will only hire her if she agrees to sleep with him. The scope for sexual blackmail is infinite.

Finally, women are consistently in a worse financial position than men, both because of lower wages in paid employment, and discrimination towards women in their power to own and manage property. [15] Their lower economic status makes them an easy prey for men who offer to pay for their sexual services, or to give or take away employment as a result of sexual favours given or withheld. A woman who is confronted by a man demanding sexual intercourse is indeed under substantial pressure to submit to his desires.

The common law does not recognize that threats and intimidation, other than threats of violence, may induce submission to sexual intercourse. Neither does it recognize the psychological and financial vulnerability of women to what amounts to "sexual blackmail" [16] in which a woman submits to sexual intercourse with a man because of his position of power over her. In Swaziland, the case of R. v. Prince Maquba [17] illustrates this. The accused was a Prince, a son of the King a a member of Parliament. He approached the complainant and demanded sexual intercourse with her. In the course of the conversation, he asked the young complainant why she was not showing respect to an older person who wanted to talk to her. The judge failed to discuss the question of submission, although the girl must have been intimidated by this older man in authority over her.

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13. Marwick, (1940) The Swazi London, p. 66.

14. Very few women are employed at managerial administrative posts - see Armstrong and Russell, A Situation Analysis of Women in Swaziland (1985) Kwaluseni, University of Swaziland Social Science Research Unit, p. 8, Table 3.

15. See generally Armstrong and Nhlapo, (1985) Law and the Other Sex: the legal position of women in Swaziland Mbabane, Webster's and Nhlapo, "Law versus Culture: Ownership of freehold land in Swaziland" in Armstrong (ed.) (1987) Women and Law in Southern Africa Harare, Zimbabwe Publishing House.

16. This term is borrowed from the language of the Zimbabwe Criminal Law Codification Committee in its Commentary, p. 13.

17. R. v. Prince Maguba, 1979-81 Swaziland Law Reports 349.

In recent years, women in many jurisdictions have called for the imposition of criminal liability in such situations, and some have been successful. Canadian law provides that there is no consent where "submission results from the application of force or threats of force to the victim or someone else, fraud or the exercise of authority" [18]

Reformers in South Australia argue that "consent which is grudging or elicited by substantial pressure of the victim should be regarded as inoperative." They are asking for a legal provision providing that submission induced because of the accused's position of authority over the victim, or his position of trust over her, or when she is detained under his care or the victim is under the age of 18 and living in the accused's family home, is not legal consent. [19]

Several countries have created separate sexual offences to deal with this problem. In India, sexual intercourse between certain specified persons, such as a public servant and women in his custody or the staff of a hospital and women in the hospital, is a crime. [20] New Zealand has introduced the crime of "inducing sexual connection" which makes it a crime to induce sexual intercourse by:

(i) an express or implied threat that the offender of some or some other person will commit an offence punishable by imprisonment, which does not involve the actual or threatened application of force to any other person,

(ii) an express or implied threat that the offender or some other will make an accusation or disclosure, whether true of false, about the misconduct of any person, living or dead, and the disclosure is likely to damage that person's reputation, and

(iii) an express or implied threat by the offender to make improper use of any power or authority arising out of any occupational or vocational post held by the offender to the detriment of the victim, or any commercial relationship existing between the offender and the victim [21]

The Criminal Law Codification Committee of Zimbabwe has suggested the following section of the proposed Criminal Code:

> 36.(1) Any male who unlawfully and intentionally has vaginal or anal sexual intercourse with a female or performs any other indecent act upon her after having used threats or intimidation, not being threats of violence, in order to induce the female to allow such acts to be performed upon her shall be guilty of an offence.

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18. Connors, op. cit., at p. 37.

19. Ibid, referring to the Naffin Report.

20. Indian Penal Code, s. 376 A-376-B.

21. New Zealand Crimes Act 1961, s. 129a cited in Connors, op. cit. p. 38

> (2) It shall be no defence to this offence that the female consented to the act of sexual intercourse itself after the threats or intimidation had been used. [22]

It is clear that submission to sexual intercourse may occur in situations where the woman has not truly consented, but which the law has historically failed to recognise as rape. Women in a position of vulnerability should be protected from sexual exploitation by a recognition that submission resulting from such undue pressure does not amount to consent.

4. FRAUD

The issue of fraud with regard to consent in rape cases is a difficult one. The common law position is that fraud which represents an error personae or an error in negotio will be vitiate consent, but any other kind of fraud will not. The case of R. v Prince Maquba [23] discusses the issue of fraud. In that case, the complainant was approached by the accused, who was the half-brother of the man to whom she had borne a child and was to marry. "The accused told her he would like to take her over - 'gena' her - while his brother was still alive." The complainant alleged that the accused then raped her, but the court did not believe her story, saying,

> it is probable that although there was no rape in the sense testified to by the complainant, the accused and the complainant did have intercourse, her consent thereto having been induced by the misrepresentation that he was an older prince who was entitled to demand intercourse with her. It is what one might describe as a siSwati type of droit de seigneur. [24]

The judge goes on to discuss the application of the law if the facts are as he has postulated:

> even if the facts be as I have postulated them, this does not constitute rape in law. It is of the essence of rape that intercourse should have taken place without the consent of the woman concerned; and fraud may vitiate consent. But it has been held that it is not every fraud that will have this effect: it must be a fraud inducing either an error personae - for example X inducing Y to believe that he is her husband - or an error in negotio for example X inducing Y to believe that the act of intercourse is indeed intercourse and she is deceived only in regard to the effects it will have or the attributes of the person having the intercourse with her, her consent is not vitiated... It appears to me that any misrepresentation by the accused in regard to his right to ngena the complainant would fall into this category, and would not vitiate the consent. [25]

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22. The proposed Criminal Code is not in force, or even translated into a Bill. This information is taken from a cyclostyled version of the proposed code circulated for comment, but not published.

23. Op. cit.

24. at p. 353

25. Ibid.

Therefore when the Prince fraudulently convinced the young girl that he had a right to sexual intercourse with her, and the girl submitted to his wishes under the impression that she was bound to do so, she was held to have consented to sexual intercourse and there was no rape. The case was treated in the same way as a situation where a man fraudulently promises to marry a woman and gains her consent in that way, or fraudulently misrepresents his financial status and gains her consent because she thinks he is rich.

5. 'STATUTORY RAPE'

In Swaziland, as in most common law jurisdictions influenced by English criminal law, there is a provision for so-called "statutory rape." The Girl's and Women's Protection Act 39/1929 makes it an offence for a male person to have unlawful carnal connection with a girl under the age of sixteen years. The consent of the girl is irrelevant under the statute.

There are two questions with regard to statutory rape. The first question is, what is meant by "unlawful intercourse"? The second is, since a woman's consent is not necessary for a valid marriage under customary law, what is the position where the girl under the age of 16 has been married without her consent?

What is "unlawful intercourse"? The general common law rule, based on English law, is that all intercourse within marriage is lawful, so that a husband cannot be convicted of the rape of his wife. Therefore, intercourse with a girl below the age of 16 who is validly married would be lawful intercourse, and not forbidden by the statute. Since a marriage under Swazi customary law has no age limit, a girl below the age of 16 can legally marry, intercourse within such a marriage would be lawful, and the husband could not be convicted under Act 39/1929.

This issue was considered in R. v. Mhlabane.[27] The accused had been convicted in the Magistrate's Court of unlawful carnal connection with a girl of fourteen years in contravention of the Girl's and Women's Protection Act. The main issue on appeal was whether the complainant and the accused were married at the time when sexual intercourse took place according to Swazi law and custom, and if so whether the accused should have been found guilty under the Act. The magistrate suggested that even if the complainant and accused were married according to Swazi Law and Custom, since the girl was under the age of 16, the Girl's and Woman's Protection Act and the "repugnancy clause" [28] required the accused to wait until she reached 16 before having sexual relations with her. The appeal court disagreed saying:

> it does not appear to me that the marriage of a girl of fourteen years old followed by sexual intercourse would in Swaziland necessarily be regarded as being repugnant to natural justice or morality ... no general rule can be laid down

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26. Hunt, op. cit., at p. 347-9

27. R.v. Mhlabane 1977-78 Swaziland Law Reports 188.

28. S. 11 (a) of the Swazi Courts Act 80 of 1950 which says that Swazi customary law should be administered "so far as it is not repugnant to natural justice or morality" (cited at p. 190 of the Mhlabane judgement).

> but....each case must be judged on the female but her mental and physical capacities which should be the main relevant consideration in the application of the repugnancy test. If these are adequate then the customary practice whereby the consent of the child is not necessary to the marriage would not be regarded as repugnant. The position might be different if the child does not consent to the actual intercourse, but here she in fact did so.[29]

The court held that the traditional ceremony indicating marriage, the smearing of red ochre, had not yet taken place when the accused had sexual relations with the complainant, and therefore a valid customary law marriage did not exist at the time of the intercourse.

The second question is the question of consent to marriage. The girl in the Mhlabane case had apparently not consented to the marriage, but had consented to the intercourse. The court held that a marriage without consent is legal under Swazi Law and Custom, but reasoned in a circular manner. The judge seems to be saying that if the child is mentally and physically capable of giving her consent, then her consent is not necessary for the marriage. Surely it is illogical to say that if she can consent then her consent is not necessary. The court then states that the important issue is whether the child consents to the actual intercourse, yet under Act 39/1929 the consent of the girl is irrelevant and a man can be convicted even if the girl consents to the intercourse.

This issue touches at the very root of the rule that all intercourse within a valid marriage is legal, even if the wife does not consent. The rule is based on the premise that once a wife consents to intercourse with her husband by marrying him, she consents to all acts of intercourse with him in the future and for all time. A marriage to which the wife never consented would not seem to afford the husband the same protection. The learned judge in the Mhlabane case seems to recognise this by his statement that "The position might be different if the child does not consent to the actual intercourse, but here she in fact did so."

One other, earlier case also discussed the issue of consent for minors this time with regard to the traditional ceremony of endisa, which is a kind of engagement ceremony. In Regina v. Shimela alias Madandla Kumalo [30] the accused was convicted of rape, even though he had gone through the endisa ceremony, on the grounds that although in customary law sexual intercourse is allowed after endisa, it is allowed only with the consent of the girl. Therefore, although intercourse was lawful, it was lawful only with the girl's consent. This case seems to make an important distinction between saying that intercourse is lawful, because sanctioned by a public ceremony such as marriage or endisa, and saying that intercourse is permitted at all times, even if the woman does not consent. The law would be more just if marriage was treated as the endisa ceremony was treated in this case, and sexual intercourse was permitted only with the woman's consent.

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29. at page 190

30. 1956 High Commission Law Reports 105.

These issues are not moot points in Swaziland today. Some women, and not just young girls, are still married without their consent. A woman in her twenties may be kidnapped by her boyfriend's family, and smeared with red ochre, against her will. According to customary law the marriage is perfectly legal. Although Marwick reports that the consent of the woman's family is necessary and that "Nowadays the Administration requires that the girl should agree to the marriage..." [31], such coerced marriages continue to this day, and are treated as legal by all concerned parties. A further complicating factor is that all strictly traditional marriages pretend to have an element of this coercion as the bride in the traditional ceremony pretends that she does not want to leave her family and cries her anguish in the early morning hours.

Two solutions to this problem are possible. The first is to declare that marriages without the consent of the bride are not lawful marriages, and the second is to reject the notion, never explicitly accepted in Swaziland or any other Roman-Dutch jurisdiction, that marriage makes forced intercourse between the spouses legal. Both are necessary to fully protect freedom of choice in sexual matters for young girls.

6. COMPLAINTS CONSISTENT WITH LACK OF CONSENT

In a rape case, evidence that the victim complained of the rape immediately after the event is admissable to show consistency with her claim that she did not consent to the intercourse. This is an exception to the hearsay rule of evidence which ordinarily does not allow evidence of statements made to another person. This complaint must be made at the earliest possible opportunity to the first person to whom she might reasonably make it. The rule is based on the assumption that the natural and appropriate response of a woman who has been raped is to tell the first person she sees.

The rule is clearly applied in rape cases in Swaziland. The leading case is Mkhwanazi v. R [32] which explains that a complaint:

> is not to be taken as proof of the acts complained of and can only be legitimately used to show that the complainant's conduct was consistent with the complainant's testimony, to negative the complainant having consented to the sexual intercourse (where of course such consent is relevant) and to show that the complainant's conduct was what would be expected in a truthful person in the circumstances described by her. [33]

The court in that case found that the complaint was not made spontaneously, but only as a response to beatings by the mother. It is clear that in such a case, where the complaint may not have been freely given, it is better that it cannot be admitted into evidence.

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31. Marwick p. 124

32. 1979-81 SLR 83

33. at p. 86. The case refers to the Botswana case of Butale v. The State, Criminal Appeal 75/1978, for a tabulation of the requirements for admissibility of complaints.

However, some cases seem to have gone further than this, working on the assumption that all victims of rape, if they have truly been raped, will immediately report the fact to the first available person. Rather than operating to admit evidence that would otherwise be inadmissable, several judgements suggest that failure to complain of the rape immediately has become a factor which casts doubt upon the truth of the complainant's allegations. For instance, in Regina v Bernard Bhaza Dlamini [34] the court said:

> "[Complainant] was staying with her grandmother. It was dark when she got home and her grandmother had gone to bed. [She] did not awaken her to make a complaint and went to sleep in the cooking hut. One would have expected her to rouse her grandmother and complain if she had been raped as she says."

In R. v. Timothy Mkhwanazi [35] the magistrate said that he could not be certain that the complainant had not been a consenting party since she had not complained to her mother. And in R. v. Prince Maquba [36] the judge questioned the fact that the complainant did not report to the first person she saw saying:

> Dzandzane was the first person to whom she reported. She had, as appears in cross-examination, an earlier opportunity of reporting as she met one LaShongwe along the way. But she did not report to LaShongwe as she was not of her family. This may be an adequate explanation, but I have some doubt in regard to it. She also said she did not think it necessary to tell Lashongwe. I think the natural thing to have done would have been to report to her.

Modern behavioural scientists have done important research on what is actually the "natural thing" to do in such a circumstance. The pattern of the victim's response to sexual assault has come to be known as "rape trauma syndrome". Specialists describe this pattern as constituting two phases. The first phase begins about the time the victim is released by or escapes from her attacker. It is characterized by disorganization, in which the victim's life is disrupted by the impact of the rape incident. Depending on the severity of the attack, the victim may experience feelings of shock or disbelief, alternating with fear and anxiety. She will then usually develop one of two styles of coping with her emotions: an expressed style, in which she displays her feelings by crying, sobbing, smiling, and becoming restless or tense; and a controlled style in which she masks her feelings behind a calm, composed, or subdues appearance. [37] The second stage begins two to three weeks after the attack, when she

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34. Criminal Case 174/1983. In spite of the judge's statement, the accused was convicted. The case was later appealed on the grounds of insufficient corroboration, but the judgement was upheld (Appeal Case 48/1983).

35. R.v. Timothy Mkhwanazi 1970-76 Swaziland Law Reports 268.

36. Op. cit., at p. 350.

37. Griffiths (1985) "Rape Trauma Syndrome: The Overlooked Evidence in Rape Investigations" The Detective Vol 12 No. 1 Spring, p. 1.

tries to reorganize her life and integrate the episode into her life, and cope on a long-term basis. [38]

It is the first stage which interests us here, and should change our assumptions that it is always appropriate for a rape victim to complain to the first person available. The response of many rape victims, approximately half in studies done abroad [39], is to withdraw rather than to blurt out their feelings and fear. The victim's fear may result in reluctance to repeat the details of the incident to anyone. She may even experience difficulty recollecting the details of the incident in the hours immediately following the incident. Experts have documented what they call "psychological infantilism", a response to fear that has a numbing effect on the victim and is not easily dissipated. [40] Finally, the victim may refrain from reporting because of a perverse sense of gratitude, similar to the "Stockholm Syndrome" [41] found in hostages:

> Since the rapist has complied with the victim's ultimate wish--he allowed her to live--she may not report the incident at all, or only report it after time has diminished the impact of the incident and her gratitude for being released. [42]

These studies point to the fact that the immediate complaint doctrine, at least when wrongly used to mean that lack of immediate complaint is equal to a false complaint, fails to understand the shock, numbness, confusion and fear the rape victim may be feeling immediately after the episode.

7. THE MENTAL STATE OF THE ACCUSED

A further complicating factor with regard to consent in rape cases is that the prosecution must prove not only that the woman did not consent, but also that her male attacker was aware that she was not consenting. In other words, the mens rea for the crime of rape requires that the accused either knew that the woman did not consent or foresaw the possibility that she was not consenting and acted recklessly with regard to that possibility. Whether a reasonable person would have believed and acted as the accused did is irrelevant. This principle was clearly enunciated in the English case of DPP v. Morgan. [43] Although the Morgan case has not yet been followed in any case in Swaziland, it has been explicitly accepted in

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38. Ibid.

39. Ibid., p. 6

40. Ibid., p. 7.

41. Ibid.

42. Ibid.

43. DPP v Morgan, 1976 AC 182, [1975] 2 All ER 347 at p. 352

one southern African case, the Zimbabwean case of S. v. Gardner.[44] It seems clear that the case would also be followed in Swaziland.

The question of the reasonableness of an accused's belief that a woman is consenting to intercourse is clearly a difficult problem in any society. On the one hand, it is unjust for a man who genuinely thought that the woman consented to intercourse to be convicted of rape, but on the other hand it is necessary to avoid a situation where any accused person can testify that he thought the woman was consenting because he though all women fought and screamed during sexual intercourse.[45]

In most societies of the world women are assumed and socialized to be passive sexual partners and men to be aggressive in sexual matters. It is no different in Swaziland. A woman is taught to reject the advances of a man, even to be as unkind to him as possible, as part of the courtship ritual.[46] This attitude is compounded in modern times by the pervasive influence of religion, which also teaches young girls to avoid sexual contact. As a result, the woman may be confused within herself as to whether to say no or yes, and the man may be even more confused over what the woman is really saying. It is not surprising that men sometimes force themselves on an unconsenting woman and then are genuinely surprised to learn that she did not consent. On the other hand, it does not mean that every man can assume every woman will consent to his advances if pressured.

The situation is further complicated by findings of behaviour scientists on the victim's response to rape during the incident. The behaviour of the rape victim has been described in this way:

> The behavior of the vast majority of women during their contact with rapists demonstrates this traumatic psychological inflantilism. In the atmosphere of primal terror, not only do people submit, but also psychological inflantilism, with its consequent helplessness, makes it appear to the outsider that their behaviour was friendly and cooperative. It is a response of frozen fright that confuses everyone: the rapist, the victim's family, her friends, the police, and even the victim herself.[47]

Therefore, the submissive behaviour discussed above may not only confuse the court in determining whether the victim has consented, but also may confuse the accused during the attack itself.

Several jurisdictions have attempted to deal with these difficult problems. There are two possible responses. The first is to shift the burden of proof. Although it is a defence for the accused to argue that he believed that the victim was consenting, it is the accused who must convince the trier of fact of his belief.

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44. Zimbabwe Supreme Court Case 3/1983

45. Edwards, S. Female Sexuality and the Law, (1981) Oxford, Martin Robertson, Chapters 4 and 5

46. See Armstrong and Nhlapo, op. cit., at p. 131-2

47. Griffiths, op. cit., p. 6.

This relieves the prosecution of the difficult task of proving the mental state of the accused. [48] The provision may be formulated to require the accused to prove on a balance of probabilities his defence that he believed the victim to be consenting.

The second requires the introduction of an objective element into the question of the accused's belief. In some jurisdictions, such as some Australian states and New Zealand, the accused's belief that the victim was consenting must be a reasonable one. [49] A variation on this theme is to provide for a separate offence of sexual intercourse under the mistaken belief that there was consent. This was suggested by the Criminal Law Codification Committee of Zimbabwe which has proposed the following section:

> 34. Any male who has vaginal sexual intercourse with a mentally competent female over the age of sixteen or who performs any other indecent act upon her under the mistaken belief which was in the circumstances unreasonable that the female had consented to the sexual intercourse or to the performance of the indecent acts upon her shall be guilty of an offence.

This goes much further than the English law, which provides that the reasonableness of the accused's belief is only taken into account in determining whether the accused is telling the truth. [50]

8. CONCLUSION

I have attempted to examine the question of consent in rape cases with reference to cases in Swaziland, recent research of behavioural scientists, and recent developments in the law in other jurisdictions. The central issue involved in the crime or rape is the question of freedom of choice in sexual matters. No person should be forced to submit to sexual intercourse against her wishes. There is no room for the attitude, noted by Justice Ben Dunn, "It appears that far too many males have it deeply embedded that they have a right to sex with any woman any time." [51]

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48. Connors, op. cit., p. 40.

49. Connors p. 38.

50. Sexual Offences (Amendment) Act 1976 (England and Wales), s. 1 (2).

51. Times of Swaziland 4/4/84.